

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36157

CITY AND COUNTY OF DENVER—ACQUISITION EXEMPTION—WESTERN STOCK
SHOW ASSOCIATION IN THE CITY AND COUNTY OF DENVER, COLO.

Decided: March 23, 2018

On November 28, 2017, the City and County of Denver, Colo. (the City), a political subdivision of the State of Colorado and a noncarrier, filed with the Board a notice of exemption to acquire from the Western Stock Show Association (WSSA) the real property underlying two lines of railroad totaling approximately 1.2 miles in length in the Denver Stockyards (the Lines). The Lines consist of two corridors of rail line: (1) the National Western Drive Corridor (NWD Corridor), which is adjacent to National Western Drive; and (2) the River Corridor, which is adjacent to the east bank of the South Platte River. The notice became effective on December 28, 2017.

The City filed simultaneously a motion to dismiss its verified notice of exemption. The City explains that Denver Rock Island Railroad (DRIR), a Class III rail carrier, which operates over the Lines and owns the rail, ties, and ballast associated with the Lines, would retain its existing freight rail operating easement that would allow it to fulfill its present common carrier obligation on the Lines, and the City would not be able to unduly interfere with freight rail service. (Mot. 3; 5-6.) The City states that it will acquire no right or obligation to provide freight rail service over the Lines, and that DRIR's common carrier right to provide freight service will not be affected by the transaction. (*Id.* at 6-7.) Therefore, the City argues that the proposed real estate transfer will not amount to the sale of a rail line under 49 U.S.C. § 10901 and seeks a determination pursuant to Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C.2d 835 (1991), and related case law that the transaction is not subject to the Board's regulatory authority.¹

The current record contains insufficient information for the Board to determine whether the transaction should be dismissed pursuant to State of Maine and related precedent. Specifically, there are questions raised by the record relating to WSSA's status vis-à-vis the

¹ The acquisition of an active rail line, and the common carrier obligation that goes with it, ordinarily requires Board approval under 49 U.S.C. § 10901. But, under the State of Maine line of cases, when the carrier selling a rail line retains an exclusive, permanent easement to permit it to continue to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligations, the agency typically has found that authorization is not required because the transaction does not amount to the sale of a rail line under § 10901.

Lines and the nature of the easement. In July 1997, WSSA agreed to convey to DRIR a “non-exclusive” easement for rail purposes. (Notice, Attachment 2 at 1.) The easement states that DRIR’s rights shall terminate on the effective date of a Board order authorizing DRIR to discontinue service over the lines located on the easement. (Notice, Attachment 2 at 6.) The bill of sale for the non-real property physical assets of the Lines is incorporated by reference to the easement, and states that WSSA “reserves all rights to use the existing tracks . . . to satisfy common carrier obligations with respect to the Tracks until abandonment authority is obtained from the Surface Transportation Board.” (Notice, Attachment 2, Appendix 3 at 1.) It further states that DRIR “accepts the Tracks subject to the obligations of other entities to provide common carrier services; and agrees not to remove the Tracks . . . prior to final abandonment authority being obtained from the [Board].” (*Id.*) The record also references several proceedings from 1996, (Mot. to Dismiss at 7 n.1), which also involved the River Corridor and the NWD Corridor at issue in this proceeding. In 1996, the Board, among things, denied a petition for abandonment filed by WSSA for the Lines. See W. Stock Show Ass’n—Aban. Exemption—in Denver, Colo., 1 S.T.B. 113, 113-14 (1996).

To enable the Board to make the determination as to whether the transaction should be dismissed pursuant to State of Maine, the City will be directed to file a submission addressing the following issues by April 23, 2018:²

- 1) As detailed above, WSSA unsuccessfully filed for abandonment authority in 1995 and in 1997 transferred an easement while specifically reserving its rights to use the tracks “to satisfy common carrier obligations.” On this record, how is WSSA not a common carrier? Under the proposed transaction, how is there no transfer of a common carrier obligation from WSSA to the City?
- 2) Under the State of Maine line of cases, the sale of physical rail assets does not constitute the sale of a “railroad line” within the meaning of § 10901 when, among other things, the selling carrier retains a permanent, “exclusive” freight rail operating easement giving it the right and common carrier obligation to provide freight rail service on the line. Here, following the proposed transaction, DRIR would continue to possess only a “non-exclusive” freight rail operating easement. What was the intent, and the legal effect, of the “non-exclusive” easement provision? Does the non-exclusive easement permit the easement-holder to unreasonably interfere with DRIR’s operations?

It is ordered:

1. The City is directed to submit to the Board a pleading addressed to the issues listed above or withdraw its motion to dismiss by April 23, 2018. Other interested parties, including WSSA and DRIR, may file comments by the same date.

2. The City is directed to serve copy of this decision on WSSA and DRIR so that it is received within five (5) days of its service date and certify to the Board that it has done so.

² Alternatively, the City has the option to withdraw its motion to dismiss should it choose not to proceed.

3. This decision is effective on its date of service.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.